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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,
Petitioner,
v.

LIZZIE BEATRICE EASTERWOOD
Respondent.

LIZZIE BEATRICE EASTERWOOD,
Cross-Petitioner,
v.

CSX TRANSPORTATION, INC.
Cross-Respondent.

On Writs of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR
AMERICAN TRUCKING ASSOCIATIONS, INC.,
THE NATIONAL PRIVATE TRUCK COUNCIL, INC.,
AND THE AMERICAN BUS ASSOCIATION, INC.
AS AMICI CURIAE IN SUPPORT OF
RESPONDENT/CROSS PETITIONER

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Pursuant to Rule 37 of the Rules of this Court, American Trucking Associations, Inc., the National Private Truck Council, Inc., and the American Bus Association,

Inc. respectfully submit this brief as *amici curiae* in support of respondent cross-petitioner.¹

INTEREST OF THE AMICI CURIAE

This case presents the question whether federal regulations preempt state tort claims arising out of collisions at railroad highway grade crossings. The amici are the nation's leading organizations representing highway users that operate large vehicles. It is those highway users whose lives and property are in danger thousands of times a day at the nation's rail highway grade crossings. Accordingly, the amici have a direct and substantial interest on behalf of their members in the safety of grade crossings. In addition, the amici are able to offer to the Court a practical perspective on the dramatic reduction in safety that would, in our view, result from a ruling in favor of federal preemption in this case.

American Trucking Associations, Inc. ("ATA") is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the national trucking industry. ATA represents over 30,000 for-hire motor carriers, as well as private carriers, leasing companies, and trucking suppliers. ATA's members operate an estimated 500,000 trucks on the nation's highways. Those trucks because of their size and limited acceleration capacity are especially vulnerable at grade crossings. See Report of the Secretary of Transportation to Congress, *Rail-Highway Crossing Study* 5-11 (1989) ("1989 Report to Congress"). In addition, many of those trucks transport hazardous materials, compounding the severity of potential grade crossing accidents. 1989 Report to Congress 5-15.

Annually, over 30% of the accidents at grade crossings involve trucks (U.S. Department of Transportation, *Rail-*

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

Highway Crossing Accident and Inventory Bulletin, No. 13, Calendar Year 1990 ("1990 Accident Bulletin") 14 (Table 9)) and those accidents are the worst in terms of dollars per vehicle per accident. 1989 Report to Congress 5-13.

The National Private Truck Council, Inc. ("NPTCA") is a trade association representing approximately 1,400 companies that operate truck fleets in furtherance of their non-transportation primary businesses. They are the in-house transportation arms of manufacturers, retailers, and service companies. Private motor carriers account for over 50% of all commercial tonnage in the United States and operate approximately 80% of all commercial vehicles, estimated to be over one million trucks. Those trucks travel over 48 billion miles annually on the nation's highways. Like commercial trucking vehicles, private carrier trucks are especially vulnerable to grade crossing accidents because of their size and limited acceleration capability. Private carriers also often carry hazardous materials, adding to the severity of their grade crossing accidents.

The American Bus Association, Inc. ("ABA") is the national trade association of the intercity bus industry. The ABA has more than 500 members, who operate more than 20,000 buses and provide more than 90% of the intercity bus transportation in the United States. Because conventional motor coaches have a seating capacity of 43 to 47 passengers, bus companies face tremendous exposure to multiple fatality accidents at grade crossings. Like large trucks, buses accelerate slowly and take longer to navigate grade crossings than cars.

SUMMARY OF ARGUMENT

Unsafe rail highway grade crossings are the most dangerous places on the nation's highways; about 6,000 accidents occur at such crossings each year, causing, on average, more than 650 fatalities annually.

The vast majority of rail highway grade crossings in this country have only the most rudimentary warning systems. In 1990, of the 176,572 public crossings, over 110,000 had no active warning systems (that is, no devices that indicated the approach of a train); nearly 75,000 had no advance warning devices of any kind; and at about 42,500 crossings, the crossbucks did not even meet uniform standards. At the nation's approximately 116,000 private crossings, which are not generally eligible for federal funds, conditions are undoubtedly far worse.

These dangerous conditions persist despite substantial expenditures by both governments and railroads to improve crossing safety. For more than a century, improving crossing safety has been viewed as a responsibility shared by the public and the railroads. Railroads, spurred by reasonable care duties under state tort law, have supplemented publicly financed programs, spending in recent years, on average, over \$27 million each year on independent grade crossing projects.

If the railroads' tort responsibilities are eliminated, their incentive to continue to make independent safety improvements at crossings will also be eliminated, leaving the nation's crossings far less safe than they otherwise would have been. The federal grade crossing safety improvement program is not designed to—and is not able to—compensate for the elimination of the railroads' traditional role. Federal funding, while substantial, has never been sufficient to do the job alone. If railroads are insulated from liability, fewer crossings each year will benefit from safety improvements, which will result in more accidents and more fatalities at those crossings. It could not possibly have been Congress' intent in passing grade crossing safety legislation to create a situation that would so inevitably lead to such an anti-safety result.

The principal justification offered for eliminating the railroads' grade crossing safety responsibilities is a supposed lack of uniformity that would result from enforce-

ing state tort law. Uniformity is, however, simply not a relevant concern in this area. Each grade crossing's characteristics are unique and uniformity as to the appropriate type of warning system needed is impossible. Indeed, the Secretary of Transportation has consistently declined to prescribe uniform criteria for the devices needed at crossings. CSX's approach would lead to the uniform *absence* of safety regulation by *any* jurisdiction. That surely was not what Congress intended when it placed a limited preemption provision in a statute otherwise fundamentally designed to ensure adequate safety regulation of railroads.

Preemption of the railroads' responsibility to operate at safe speeds will also reduce highway safety. The history of the speed regulations reveals that their sole function was to minimize derailments caused by operating speeds inappropriate for the kind of track involved. Other critical factors that define a reasonably safe speed (*e.g.*, weather conditions, population, and traffic density) were not and could not be factored into the federal speed regulations. However, it is just those external factors that are the most important in determining a safe operating speed. It is impausible to suppose that Congress or the Secretary intended to allow railroads to ignore all those conditions and to proceed at speeds that are manifestly unsafe.

The arguments in support of the preemption of the railroad's duty to exercise ordinary care in controlling their trains' speed ring hollow. The argument that grade crossing safety is addressed through warning devices rather than by regulating train speed ignores the fact that the large majority of public crossings (about 110,000 out of 176,572) and nearly all private crossings (116,000) have no active warning systems. In addition, the claim that a train's speed is not relevant to accident avoidance because trains cannot stop quickly or take evasive actions, ignores the fact that the slower a train's speed the more time motorists have to see an approaching train, and to stop, drive off the tracks, or leave the vehicle.

ARGUMENT

I. PUBLICLY FUNDED CROSSING IMPROVEMENT PROJECTS MUST BE COMPLEMENTED BY RAILROAD TORT RESPONSIBILITY TO ENSURE AN ADEQUATE LEVEL OF GRADE CROSSING SAFETY.

A. Federal Grant Programs Alone Are Not Enough To Produce An Adequate Level Of Safety At The Nation's Grade Crossings.

1. *The Vast Majority Of Grade Crossings Have No Warning Devices Or Only Rudimentary Ones.*

Railroad grade crossings are the most dangerous places on America's highways. In the last five years for which data are available, grade crossing accidents and fatalities have been increasing—to an average of nearly 650 people killed each year—from their all-time low in 1985. See 1990 Accident Bulletin 3.² Grade crossing accidents are second only to aviation accidents in severity. The ratio of fatalities per accident is over 40 times greater in grade crossing accidents than in motor vehicle accidents in general. See U.S. Department of Transpor-

² From the advent of the motor vehicle, thousands of accidents and fatalities have occurred at grade crossings every year. As early as 1920, 1,273 people were killed at grade crossings and 3,977 injured in accidents involving motor vehicles. See U.S. Department of Transportation, *Railroad Highway Safety Part I: A Comprehensive Statement of the Problem* 6 (1971) ("1971 Report to Congress"). Those numbers rose at an alarming rate to an all time high in 1928, with 2,165 people killed and 6,218 people injured in motor vehicle accidents at grade crossings. *Id.*

Over the next sixty years, motor vehicle related grade crossing accidents and fatalities steadily decreased due to the combined efforts of federal and state governments and the railroads. *E.g.*, 1,588 deaths in 1940, 1,410 in 1950, 1,261 in 1960. *Id.* By 1985, annual fatalities at grade crossings had fallen to the all time low of 480. See U.S. Department of Transportation, *The 1991 Annual Report on Highway Safety Improvement Programs* II-13 (1991) ("1991 Safety Improvement Report"); 1989 Report to Congress 1-6 (Figure 1-1).

tation, *Railroad Highway Safety Part II: Recommendations for Resolving the Problem* (1972) ("1972 Report to Congress").

The major reason grade crossings are so dangerous is that so many of them lack even rudimentary safety devices. For example, in 1990 there were 176,572 public grade crossings. 1990 Accident Bulletin 45 (Table 3). Of these, fewer than 15% had automatic gates. Only an additional 17% had automatic flashing lights. Thus, the vast majority of public grade crossings—over 110,000—had no active warning devices at all.³ Additionally, at almost 75,000 crossings there was no advance warning device of any type but only a sign at the crossing itself. And at about 42,500 crossings even the crossbucks did not meet uniform standards. *Id.* 63-64 (Tables 48-49).

In addition to the 176,572 public grade crossings, there are also 116,267 private grade crossings, that is, crossings located on private land. While data are not readily available on the devices used at these crossings, there is no evidence that they are even as well protected as public crossings. In fact, private crossings are in all likelihood substantially less well protected because they are not generally eligible for safety improvements paid for with public funds.

2. *Federal Funds, While Substantial, Are Not Sufficient To Address The Problem Of Grade Crossing Safety.*

Federal and state governments have not been unmindful of the hazards posed by grade crossings. The federal

³ 1990 Accident Bulletin 59 (Table 45) ("Active warning devices" are devices that warn motorists that a train is approaching. "Passive warning devices", such as "RxR" markings on the road, or the traditional crossbuck, merely warning of the presence of a crossing and do not change appearance when a train approaches.).

government as early as 1916 authorized states to use federal aid highway funds to make safety improvements at grade crossings. Federal-Aid Road Act of 1916 (39 Stat. 355); 1989 Report to Congress 1-8. Thereafter in succeeding highway bills, Congress continued to authorize the use by a state of a portion of its federal highway funds to make grade crossing improvements. That process has continued with the latest renewal of the federal program in the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914.

Over the years, billions of federal tax dollars have been spent on grade crossing improvement projects. The Secretary's 1971 Report to Congress (37-38) notes that from 1934 to 1970, approximately \$3.2 billion was spent on grade crossing improvements, including \$2.65 billion in federal funds. Following passage of the Highway Safety Act of 1973 (Pub. L. No. 93-87, § 230, 23 U.S.C. § 130), which established a safety program aimed directly at the elimination of hazards at grade crossings, another \$2.3 billion was spent to upgrade crossings from 1974 through 1990. 1991 Safety Improvement Report IV-3. Additionally, from 1974 to 1990, an estimated \$2.4 billion in Federal-aid highway funds were devoted to rail-highway crossing related projects. 1989 Report to Congress 1-20.

Those efforts have been effective at reducing grade crossing accidents. At improved crossings, fatal accidents have been reduced by 88% and injuries by 62%. 1991 Safety Improvement Report IV-5.⁴ But it is important to recognize that these limited federal expenditures have improved only a small fraction of the grade crossings that need improvements.

Currently, the U.S. Department of Transportation ("DOT") estimates that approximately 6,000 grade cross-

⁴ The Department of Transportation estimates that 6,400 fatalities and 26,500 nonfatal injuries have been prevented since 1974 as a result of the federal grade crossing improvement program. 1991 Safety Improvement Report IV-5.

ing improvement projects are completed each year, including 2,300 involving active warning devices. 1989 Report to Congress 4. But as we have noted, there are over 110,000 public grade crossings in the United States with no active warning signals, including 75,000 that do not have any advance warning signs of any kind, along with the 116,000 private grade crossings, that in general are not eligible for publicly funded improvements. 1990 Accident Bulletin 59, 63-64 (Tables 45, 48, 49); 1989 Report to Congress 3.

In sum, at current federal expenditure levels, it will require over 40 years to equip all existing public crossings with active warning devices. Of course, during that time thousands of new crossings will be created, and substantial funds will have to be expended to replace and upgrade existing warning devices. See 1989 Report to Congress 4-8. And that does not take private crossings into account.

In the meantime, if recent trends continue—and there is no reason to doubt that they will—accidents and deaths at grade crossings will continue to occur at increasing rates. The federal grade crossing safety improvement program has worked well, but there is much more that needs to be done and clearly the federal program cannot do it all by itself.

B. In The Past, Publicly Financed Programs And Railroad Expenditures Spurred By Reasonable Care Duties Have Worked Cooperatively To Improve Grade Crossing Safety.

Over the years, a three-pronged approach has been developed to deal with the problem of unsafe conditions at grade crossings. For over a century, under state common and statutory tort law, railroads have been responsible for warning travelers of approaching trains. See, e.g., *Continental Improvement Co. v. Stead*, 95 U.S. 1 (1877). That responsibility has occasioned the expenditure of hundreds of millions of dollars by the railroads

over the years to improve warning systems at grade crossings. For example, from 1985 to 1987, railroads spent on average more than \$10 million per year on privately funded installations of active warning devices at public crossings and over \$27 million per year on all types of improvements to public grade crossings. 1989 Report to Congress 3-8 (Table 3-3).

State and local governments have also played an important role in improving grade crossing safety. States have assessed a portion of the cost of improving grade crossings against the railroads themselves. The portion assessed against the railroads has varied over the years, and it varies from state to state. *See, e.g., Missouri Pacific Railroad v. Omaha*, 235 U.S. 121 (1914); *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935); 1972 Report to Congress 26-27 (Table 11) (state by state percentage cost assessment to railroads on non-federal aid grade crossing projects); *see generally* 1971 Report to Congress Appendix A.

States continue to maintain independent grade crossing improvement programs, although in recent years more reliance has been placed on the federal programs. *See* 1971 Report to Congress A-20 - A-21. Currently, 16 states have separate state programs from which separate state safety grade crossing projects are funded. 1989 Report to Congress 3-6.

As we discussed above, since 1916 the federal government has made a significant commitment to improving grade crossing safety. However, throughout the decades the federal program has been in place, there has never been the slightest hint that Congress intended to supplant other parallel state and railroad safety efforts. Indeed in her 1972 and 1989 reports to Congress, the Secretary of Transportation ("Secretary") each time noted with approval the dual financial responsibility (railroad and public) for installing grade crossing protective devices. 1972 Report to Congress 33; 1989 Report to Congress 7

("Responsibilities for crossing improvements and maintenance are generally shared between public agencies and the railroads. . . . No recommended changes in the current responsibilities or programs are being recommended at this time."). Further, the Secretary's assumption of the railroads' continued tort liability for grade crossing accidents evidences her position that the federal crossing improvement program had not relieved the railroads' of their traditional responsibilities. *See infra*, 12 n.6, 14 n.8.

The multi-faceted, shared responsibility approach has worked well in correcting grade crossing safety problems. If railroad tort liability is preempted, however, railroads will have essentially no incentive to spend money to improve crossing safety. Overall national spending on crossing safety will be reduced by tens of millions of dollars yearly. This can only result in substantially diminished safety at grade crossings throughout the nation.

C. Elimination Of Railroads' Tort Responsibility Will Eliminate Their Incentive To Independently Make Safety Improvements At Grade Crossings.

The Secretary of Transportation has recognized that railroads are often in the best position to identify and correct grade crossing safety problems. *See, e.g.,* 1989 Report to Congress 3-4 ("The railroads' responsibility for the design and construction of crossing improvement projects generally applies to traffic control devices located at the crossing and involving connections to railroad signal systems. Railroads are involved in this aspect of improvement projects due to the interconnection with other railroad signal systems, the experience and expertise of their personnel, and railroad labor laws."); 1972 Report to Congress 33; Brief for the United States as Amicus Curiae Supporting Affirmance ("United States Brief") at 26 n.30. Indeed, it is just common sense that the rail-

roads are often in the best position to identify hazardous crossings and are generally the first to be aware of changed traffic conditions that dictate added precautions at particular crossings. It is also the railroads that have the flexibility to act quickly to rectify hazardous situations.⁵

Under the current public/railroad shared responsibility system for ensuring that grade crossings are maintained in the safest possible condition, the railroad's potential tort liability is a powerful incentive for them to independently make grade crossing safety improvements where federal funds are unavailable. From 1985 through 1987, the Association of American Railroads estimated that its members paid out \$60 million per year in awards and settlements arising from grade crossing accidents and incurred at least that much again in litigation costs—over \$120 million total per year. 1989 Report to Congress 7-5.⁶ During that same period, as discussed above, the

⁵ The DOT has adopted various regulations setting forth detailed procedures that states must follow in identifying hazardous crossings and implementing improvements. See, e.g., 23 C.F.R. § 924.7 (guidelines for evaluating safety projects); 23 C.F.R. § 924.9(a) (guidelines for prioritization of grade crossing projects); and 23 C.F.R. § 646.214(b)(4) (requiring DOT approval of improvement projects). In addition, the states are working with limited amounts of money each year that are often earmarked for specific projects well in advance. See 23 U.S.C. § 130(p). Accordingly, the states, under the federal program, are locked into fixed procedures and schedules for crossing improvements and cannot quickly react to rapidly developing hazardous situations. On the other hand, railroads are free to act immediately when circumstances dictate, to secure public agency approval of their improvement plan, and to implement changes quickly. See United States Brief at 20 n.19.

⁶ The Secretary of Transportation, after noting the railroads' tort liability costs, stated that "[f]rom a future program standpoint, liability costs can best be addressed and, it is hoped, reduced through improved levels of devices at crossings, and the achievement of maximum effectiveness from the system components." 1989 Report to Congress 7-6. That is hardly the statement of an individ-

railroads spent more than \$27 million per year in independent grade crossing improvement projects to mitigate their tort exposure. 1989 Report to Congress 3-8.

Over the last century, independent railroad grade crossing projects have, at a plausible estimate, made tens of thousands of grade crossings safer, thereby improving crossings for which no federal funds were available or freeing up federal money for other crossing projects. If the railroads' crossing improvement projects have been even half as effective as federally funded projects (an 88% reduction in fatalities and a 62% reduction in injuries at improved crossings), tens of thousands of accidents have been prevented and thousands of lives saved through the railroads' independent efforts—efforts induced by state tort law requirements.

Despite the dramatic results of their grade crossing projects, Petitioner Cross-Respondent CSX Transportation, Inc. ("CSX") claims that it is now barred by federal law from undertaking independent grade crossing projects. CSX Brief 35, quoting *Hatfield v. Burlington N. R.R.*, 958 F.2d 320, 323 (10th Cir. 1992). That assertion is manifestly incorrect. CSX is at all times free to seek the approval of local authorities to improve grade crossings. But as a practical matter, if CSX and other railroads are relieved of tort liability, they would have no incentive to act independently and the tens of millions of dollars they are now spending annually to install active warning devices and make other safety improvements at grade crossings would not be spent.

The impact on grade crossing safety is obvious. Accidents that would otherwise have been prevented will continue to occur and hundreds of lives will be lost that could have been saved.

ual who thought that the railroads' ordinary tort liability had been preempted in any way.

Exacerbating this anti-safety result is CSX's further claim that federal law now preempts not only the railroads' state common law duties, but also prohibits the states from requiring the railroads to share in the cost of non-federal state grade crossing improvement projects. CSX Brief at 22, 42.⁷ This extension of the preemption analysis will eviscerate most states' grade crossing programs which often rely heavily on the railroads' financial participation. See 1972 Report to Congress 26-27 (Table 11).⁸

Accordingly, the federal preemption position advocated by CSX will not only eliminate the first prong of the historic three tier system to enhance grade crossing safety (railroad action spurred by potential tort liability), it will also disable the second prong (state sponsored programs) by eliminating the states' ability to rely on the railroads for needed funding. The public and highway users will be left with only the federal grant program, which, by itself, is plainly not sufficient to do all that is necessary.

⁷ CSX blatantly ignores the fact that the limitations on a state's ability to require a railroad to contribute to a crossing improvement program (23 C.F.R. § 646.210) apply only to "Federal-aid projects." See also 1971 Report to Congress 19 ("[T]he financial responsibility of the parties—the railroads and the public highway authorities—having an interest in railroad-highway intersections is *governed by state laws and regulations*, except to the extent that improvement projects utilizing Federal-aid highway funds to pay a part or all of the cost are governed by Federal laws, rules and regulations." (Emphasis added)).

⁸ CSX argues that the Secretary's finding that improvements to certain grade crossing have no "net benefit" to the railroads is a strong indication that railroads have no continuing duty to make improvements to the crossings. CSX Brief at 34. To the contrary, the Secretary found that the railroads' tort liability costs were roughly equivalent to—and therefore offset by—its increased maintenance costs at improved crossings (thus no financial benefit to the railroad from the improvement). That is, the Secretary assumed that the railroads would continue to be subject to tort liability. See 1972 Report to Congress 102-104.

As discussed in the next section, Congress' stated purpose in enacting the Railroad Safety Act ("RSA") was to "promote safety." Surely, in the service of that important purpose, Congress did not invoke a form of federal preemption that would so inevitably lead to such an anti-safety result. The historic three tier shared responsibility system of promoting grade crossing safety is still needed to ensure highway users reasonably safe grade crossings.⁹

II. GRADE CROSSING SAFETY, NOT NATIONAL UNIFORMITY, HAS BEEN CONGRESS' GOAL IN ENACTING GRADE CROSSING SAFETY PROGRAMS.

CSX's claim for preemption rests entirely on 45 U.S.C. § 434, the RSA preemption provision, which it interprets as blindly enacting an iron rule of "uniformity" and "preemption." Of course, even the preemption provision itself recognizes that absolute uniformity is not practical or even desirable, "[t]he Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the *extent practicable*." 45 U.S.C. § 434 (emphasis added). Further, CSX's fixation on uniformity misses Congress' main purpose, which was "to promote *safety*"—not uniformity—"in all areas of railroad operations and to reduce railroad-related accidents." 45 U.S.C. § 421 (emphasis added).

Moreover, § 434's explicit preservation of any state "law, rule, regulation, order, or standard relating to railroad safety" until the Secretary "adopt[s] a rule, regula-

⁹ We note that the decades-long trend of reductions in grade crossing accidents reversed at approximately the same time that the railroads began advancing their grade crossing preemption claims in court (the early to mid 1980s) and began efforts to support those claims by cutting back or eliminating their independent grade crossing projects. Grade crossing accidents and fatalities have increased markedly over the last five years. 1991 Safety Improvement Report II-12.

tion, order, or standard covering the subject matter of such requirement" illustrates that safety, not uniformity, was Congress' primary concern. Congress clearly preferred leaving in place as many as 51 different state approaches to a railroad safety problem rather than running the risk of a regulatory gap that would eliminate any governmental regulation of a particular safety hazard.

A. Highway Users Benefit From And Support Uniform Federal Standards Which Enhance Highway Safety.

Highway user organizations, such as the amici here, often support federal preemption because the imposition of a national standard enhances highway safety. For example, federal safety standards regulating motor vehicle equipment, design, and performance enhance safety through uniformity. See 15 U.S.C. § 1392(d) (preempting motor vehicle safety standards not identical to federal standards); 49 C.F.R. Part 571 (setting forth Federal Motor Vehicle Safety Standards). It is easy to appreciate the negative impact on safety and commerce if motor vehicles were subject to varying, potentially inconsistent safety standards as they moved about the country. Likewise for trucking, in the area of hazardous material transportation, uniform standards relating to hazardous material classifications, packaging, placarding, and shipping documents enhance safety through uniformity and preemption. See 49 U.S.C. § 1804(a)(4); 49 C.F.R. § 107.202.

Similarly, in the area of rail/highway grade crossings, highway users recognize the importance of federal preemption, and the uniformity it creates, when that uniformity is based on the existence of an affirmative federal regulation covering the same subject matter and not simply a regulatory vacuum. Only then does uniformity actually promote safety and fulfill the core mandate of the RSA. For example, the U.S. Department of Transportation, *Manual on Uniform Traffic Control Devices* (1988) ("MUTCD")—promulgated as a federal regula-

tion (23 C.F.R. § 655.603)—requires public highways that cross a railroad track to bear certain pavement markings and signs (see *MUTCD* §§ 8B-1 to 8B-9), the appearance of which are described in great detail. In addition, for active devices at crossings, the Manual also sets forth specifications regarding appearance and placement (see *MUTCD* §§ 8C-1 to 8C-7). These requirements of visual uniformity promote highway safety because they "simplif[y] the task of the road user" and "aid[] in recognition and understanding." *MUTCD* § 1A-2.

B. No Federal Regulation Creates—Or Could Possibly Create—Uniformity In The Determination Of What Type Of Warning Devices, If Any, Is Needed At Particular Grade Crossings.

The *MUTCD* plainly does not, however, contain standards to guide the initial decision whether, or what type of, active warning device is required at any particular grade crossing.¹⁰ In fact, in several places, the Manual specifically states that determination is an engineering judgment beyond the *MUTCD*'s scope:

The decision to use a particular device at a particular location should be made on the basis of an engineering study of the location. Thus, while this Manual provides standards for design and application of traffic control devices, the Manual is not a substitute for engineering judgment. *It is the intent that the provisions of this Manual be standards for traffic control devices, installation, but not a legal requirement for installation.*

MUTCD § 1A-4 (emphasis added); see also 1989 Report to Congress 4-8 ("there are no warrants in the *MUTCD*

¹⁰ In analyzing the pros and cons of uniform warning systems at grade crossings, the Secretary observed that it was "necessary to achieve a reasonable degree of uniformity in practice nationwide", but expressed the concern that too rigid a uniformity could be a "deterrent for developing and testing new devices." 1971 Report to Congress 62 (emphasis added).

to specify the installation of certain devices at crossings with certain characteristics.").

The *MUTCD*'s provisions dealing with the selection of traffic control devices and systems at grade crossings likewise acknowledge that:

[d]ue to the large number of significant variables which must be considered there is no single standard system of active control devices universally applicable for grade crossings. Based on an engineering and traffic investigation, a determination is made whether any active traffic control system is required at a crossing and, if so, what type is appropriate.

Id. § 8D-1.

As previously discussed, under the traditional shared responsibility for grade crossing safety, it is often the railroads that are in the best position to make the judgment as to the need for and type of device required at a particular crossing. The peculiar hazards at individual crossings often come to the railroads' attention first and it is the railroads that have the flexibility to act quickly to supplement public programs and make needed improvements to dangerous crossings where public funds are lacking or where the crossing is low on the state's current priorities.

While agreeing with this general proposition, the government's brief notes that the Secretary's regulations do condition the expenditure of federal funds on a requirement that automatic gates be installed at certain types of crossings. The regulations further require DOT approval of the systems chosen to upgrade other crossings with federal monies. *See* 23 C.F.R. § 646.214(b). From those provisions, the government concludes that the Secretary has, in those instances, regulated the type of warning system needed at crossings that receive federal funds and that the railroads' further responsibilities at those crossings are thus preempted. United States Brief at 23-24.

The preemption system suggested by the United States is impractical and indeed may work against Congress' intent to promote safety. The government itself recognizes some of the impracticalities of the approach it proposes; for example, the government acknowledges that if circumstances later change at a federally improved crossing, making it no longer safe, the railroads will, if negligent, again be held liable in tort. *Id.* at 24 n.26. In the meantime, a railroad, complacent because of its presumed insulation from liability, may sit idly by no matter how dangerous a particular crossing may become or how much traffic patterns at the crossing may change.

From a practical point of view, however, the deeper problem with the government's approach is that regulations governing the expenditure of federal funds simply do not—in the words of 45 U.S.C. § 434, the provision on which CSX relies—"cover[] the [same] subject matter" as state tort law. The federal regulations concern how to best allocate scarce federal funds. As we explained above, while the federal government has devoted considerable resources to grade crossing improvements, those resources are not remotely adequate to address all the safety needs at the nation's grade crossings. Federal regulations "cover the subject matter" of how those funds should be spent to achieve the best results, given the limited funds available. State tort law duties, by contrast, require the railroads to provide a reasonable level of care at all the grade crossings that they use. That reasonable level of care in many instances will be much greater than what can be accomplished with federal funds that are limited and spread thin.

Moreover, the government's approach is inconsistent with the understandings that have prevailed in this area for decades. As we have explained, throughout the long history of government funding of grade crossing improvements, all parties concerned—the federal government, the states, highway users, and the railroads—all understood

government funding efforts to be a supplement to other sources of funds, including railroad expenditures prompted by their state law liability. Government funding, including federal funding, was never seen as a replacement for railroad responsibility. The Secretary of Transportation recognized the continued existence of railroad tort liability as late as 1989; indeed, the Secretary simply assumed that tort liability continued, notwithstanding the federal expenditures. 1989 Report to Congress 7-6. The Secretary made these statements long after the adoption of the regulations on which the government relies.

The better, more workable solution would be to continue to hold the railroad to its traditional common law duties. Of course, as a matter of state law, the fact that a particular crossing was improved with federal funds, or was evaluated by government officials and found not to need improvement, may furnish the railroad with a defense to tort liability. *See, e.g., Karl v. Burlington Northern R. Co.*, 880 F.2d 68, 76 (8th Cir. 1989); *See generally Restatement (Second) of Torts* § 288C, comment a (1965).

Throughout its brief, CSX urges this Court to ignore safety in the name of uniformity. *See, e.g., CSX Brief* at 7, 22, 41. There is, of course, no need for such a distasteful trade off. Assuming that a railroad may need to secure permission from an appropriate state agency for an independent grade crossing project, the only form of uniformity possible (in the appearance and placement of warning devices) can be ensured by requiring the railroad to conform its project to federal standards. Uniformity will be achieved and not at the expense of safety.¹¹

¹¹ The uniformity concerns that Congress sought to eliminate through the RSA's preemption provision dealt almost exclusively with subjecting the railroads to a variety of state enforcement and administrative requirements that could prove to be conflicting and burdensome. *See H.R. Rep. No. 1194, 91st Cong., 2d Sess.* 19 (1970) at 19 ("railroads should not be subject to [a] multiplicity of enforcement by various certifying States as well as the Federal Government").

III. PREEMPTION OF THE RAILROADS' RESPONSIBILITY TO OPERATE AT A SAFE SPEED (GIVEN ALL RELEVANT CIRCUMSTANCES) WILL DIMINISH HIGHWAY SAFETY.

A. Federal Speed Regulations Are Designed To Reduce The Risk Of Train Derailments.

The unmistakable function of DOT's train speed regulations (49 C.F.R. § 213) is to minimize derailments by setting forth the maximum speed that trains may use on each of six classes of track. The regulations (which, significantly, appear in the part of the Code of Federal Regulations entitled "Track Safety Standards") provide several criteria that a segment of track must meet to be included within a particular class.¹² These criteria relate to stability, strength, and other quality factors and have nothing to do with the location of the track, weather conditions, or other conditions that might warrant a reduced speed. *See, e.g., Sisk v. National R.R. Passenger Corp.*, 647 F. Supp. 861, 864 (D. Kan. 1986) ("These regulations are aimed at reducing the possibility of derailments and train collisions").

The history of the speed regulations unambiguously reveals that their intended function was to minimize derailments caused by speeds that were inappropriate for the kind of track involved. For example, the Secretary adopted higher speed limits for passenger trains than for freight trains, observing that the former had "a superior suspension system and lower center of gravity." 49 Fed. Reg. 20,336 (1971). Suspension and center of gravity affect the ability of the train to stay on its rails at a

¹² *See, e.g., 49 C.F.R. § 213.53* (specifying minimum and maximum gage for each class of track); *id.* § 213.55 (specifying maximum deviation from uniformity of alignment for each class of track); *id.* § 213.63 (specifying various track surface requirements for each class of track); *id.* § 213.109(c) (specifying required number of cross ties per 39-foot segment of track for each class of track); *id.* § 213.115 (specifying maximum permissible mismatch of rails at joints for each class of track).

given speed. The fact that two trains of identical weight are allowed to travel at different maximum speeds demonstrates that the Secretary was not attempting to establish a reasonable speed that was sensitive to such external factors as weather conditions, congested locations, etc.

B. Tort Responsibility Requires Railroads To Operate At Safe Speeds Under All Applicable Circumstances.

In Georgia a railroad "must exercise ordinary care" in controlling train speed. See *Atlantic Coast R.R. v. Grimes*, 109 S.E. 2d 890, 893 (Ga. Ct. App.) (1959). Obviously what constitutes a reasonably safe speed for operating a train depends upon a number of circumstances and not just track condition. Weather conditions that reduce visibility (fog, snow, rain, etc.) for both the train operator and motor vehicle driver dictate slower speeds. Population and traffic density also enter into the decision of what is a safe speed at a given location. In addition, many other external factors that the railroads are in a unique position to take into consideration (e.g. crossings in close proximity to schools or crossings with limited or partially obstructed track views) must be considered in selecting a reasonable speed. It is wholly implausible to suggest that in the name of safety, Congress and the Secretary eliminated the railroads' long-standing responsibility to take these other critically important factors into consideration when selecting a safe train operating speed.

C. The Arguments Against Holding Railroads To Ordinary Care Standards In Controlling Train Speed Ignore Relevant Aspects Of The Grade Crossing Safety Problem.

CSX's and the United States' arguments in support of preemption with respect to train speed ignore other practical aspects of the grade crossing safety problem as well. For example, each argues that the Secretary

has chosen to address grade crossing safety through warning devices, making train speed irrelevant. CSX Brief 46-48; United States Brief 29. This argument overlooks the obvious problem that about 65% of the nation's public crossings (over 110,000 crossings) and virtually all of the nation's 116,000 private crossings have no active warning devices to warn motorists of approaching trains.

The United States also alludes to purported safety problems with speed limitations arising from possible derailments caused by "emergency braking." United States Brief 30. Of course, a state tort law requirement that trains proceed at a reasonable speed does not put them in emergency braking situations. Finally, CSX strongly implies that a train's speed is largely irrelevant to accident avoidance because a train, no matter the speed, cannot be stopped quickly or take evasive action to avoid an accident. CSX Brief 48-50. CSX's argument ignores the other side of the equation; motor vehicles can be stopped (or accelerate quickly) and can take evasive action. Of course, the slower the train's speed, the more reaction time motor vehicle drivers have and the greater their opportunity to maneuver to avoid a collision. A train's speed is thus hardly irrelevant to accident avoidance at grade crossings.

Allowing trains to operate at speeds checked only by federal regulations dealing with track standards will unquestionably have a negative impact on highway safety and will thus be directly contrary to Congress' intent in enacting the RSA.

CONCLUSION

The judgment of the court of appeals in No. 91-790 should be affirmed. The judgment of the court of appeals in No. 91-1206 should be reversed.

Respectfully submitted,

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